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In the Supreme Court of the United States

October Term, 1945.

No. 1[redacted]116

WALTON-VIKING COMPANY, a Corporation, *Petitioner*,

vs.

WALTER KIDDE & COMPANY, INC., a Corporation, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND SUPPORTING BRIEF.

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INDEX.

Cases Cited.

Statutes.

Text Books.

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Petitioner prays certiorari to review a judgment of the Eighth Federal Circuit entered March 11, 1946 (R. 432).

Summary of the Matter Involved.

In an action at law, tried without a jury, before the Honorable John C. Collett, in the United States District Court for the Western Division of the Western District of Missouri, plaintiff (petitioner) sought and recovered against defendant (respondent) a judgment for $53,750.33 as and for commissions to plaintiff as distributor-agent for bringing about the sale of 10,800 portable fire ex-

tinguishers of defendant's manufacture. On appeal, by a divided opinion, the Eighth Circuit (Judge John B. Sanborn writing, Judge Joseph W. Woodrough concurring, Judge Harvey M. Johnsen dissenting) the trial court's judgment was reversed outright and remanded with directions to enter judgment for the defendant for $484.07. The controversy concerns the proper method of computing plaintiff's commissions under a written agency agreement.

Opinions Below.

Judge Collet's judgment (R. 41) was supported by full fact findings (R. 28-37) and conclusions of law (R. 38-41); the majority and dissenting opinions of the Eighth Circuit, not yet reported, were filed March 11, 1946 (R. 423-433).

Jurisdiction.

The suit, filed in a Missouri state court, was removed by defendant because it was a New Jersey and plaintiff was a Missouri corporation, and the jurisdictional amount was involved (R. 6-10). In the court below plaintiff's petition for rehearing, filed March 26, 1946 (R. 446), was denied April 12, 1946 (R. 447), and a motion to stay the mandate, filed April 22, 1946 (R. 447), was sustained April 24, 1946 (R. 448). Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

Defendant, a manufacturer (by form contract prepared by it) appointed plaintiff its exclusive agent for one year to sell in a specified territory defendant's products, on a commission basis, represented by the difference between

the contract price to customers and a published schedule of prices to the agent. The contract further provided that the commission schedules were subject to change without advance notice and that defendant reserved the right "to alter them if necessary to meet any unusual conditions not specifically covered." Defendant marketed its products through agents in two ways: (1) by ordinary orders, and (2) by "annual purchase contracts" (which defendant urged and encouraged agents to procure), obligating the purchaser to buy a minimum number of products during the period of a year at fixed prices, with the option of purchasing during the period as many more as he needed at contract prices. Plaintiff negotiated such an annual purchase contract, calling for a minimum of 750 fire extinguishers of any model and as many more as the purchaser ordered during the year, all at fixed prices, under which the purchaser ordered 10,800 extinguishers, all of which were delivered and paid for at contract prices. *After* the agent had negotiated this contract the manufacturer first cut the commissions in half, and later to a small fraction thereof, by increases in the scheduled prices to agents. The agency agreement provided that it was to be interpreted by the laws of New Jersey. *Quaere*—

(1) Was the trial court right in ruling that plaintiff *earned* its commissions on all 10,800 extinguishers when it negotiated the annual purchase contract and was therefore entitled to be paid on the basis of defendant's schedule of commissions then in effect?

(2) Were Judge Collet, of the trial court, and Judge Johnsen, of the appellate court, correct in holding that in any event the agency agreement was ambiguous as applied to the purchasers' optional orders; and that the contemporaneous interpretation of the agreement for almost a year by both plaintiff and defendant, during the

period when all 10,800 orders were received, controlled and settled the meaning of the agency agreement?

(3) Plaintiff having been employed to procure a contract providing for both firm and optional orders, and having produced what it was employed to procure, did the majority opinion of the court below err in failing to distinguish between commissions *earned* and commissions *accrued*, and in ruling that defendant had the absolute right to apply the reduced commission schedules to all such orders subsequently given?

(4) If defendant had the right to reduce plaintiff's commissions on the optional orders, was the reserved right absolute or conditional; and if conditional, was defendant justified in reducing commissions (1) because the orders procured were war orders, (2) because less sales effort was necessary, (3) because defendant feared renegotiation and was afterwards renegotiated?

(5) Assuming that defendant, a subcontractor of a war contract, was subject to renegotiation, did the "Renegotiation Act" of April 28, 1942, as amended, empower defendant to "renegotiate" plaintiff, on the theory that the contract commissions might be found to be unreasonable or excessive?

(6) If defendant had the right to reduce plaintiff's commissions on the optional orders, then, whether the right was conditional or absolute, was defendant bound by the law to exercise that right in good faith; and was it good faith where defendant, instead of passing to the purchaser the benefit of the reduced commissions, appropriated the reductions to itself?

Reasons for the Allowance of the Writ.

(a) Under defendant's split commission policy, the $53,750.33 here in dispute represents only plaintiff's one-half of a total disputed commission of $107,500.66. On July 21, 1941, when plaintiff negotiated the annual purchase contract in question, defendant had in force between 300 and 350 other annual purchase contracts, procured by other agents (R. 234) operating under the same type of agency contract and the same schedules of commissions (Judge Collet's Finding No. 16, R. 35-36; R. 234). When defendant, after the elapse of a year, "recomputed" and reduced plaintiff's commissions by $53,750.33, it made like "adjustments" in all the other cases. Plaintiff "was one of the smaller cases at issue" (R. 220). And while the record disclosed no other pending suits, the decision below has, and the review herein sought will affect the rights of hundreds of other agents, involving, it may fairly be assumed, commissions amounting to many millions of dollars.

(b) The majority opinion (R. 429-431) holds that defendant not only had the absolute right to reduce plaintiff's commissions on orders given by the purchaser after the negotiation of the annual purchase contract, but also that the agency agreement was so clear that the practical interpretation of the parties to the contrary did not and could not affect its meaning. The opinion went further and ruled that the contrary constructions of Judge Collet in the trial court, of Judge Johnsen in the appellate court, and of the parties themselves in interpreting their own agreement, and of 300 other agents and the defendant, in construing like agreements, were in effect so unreasonable as not to admit of a view contrary to that of the majority. And in so ruling, the opinion departed from the

settled law of New Jersey, as announced by these controlling decisions: *Van Dyke* v. *Anderson*, 83 N. J. Eq. 568, 91 A. 593 (1914); *Thomsen et al.* v. *Riedel*, 114 N. J. L. 379, 176 A. 701 (1935); *J. I. Kislak, Inc.*, v. *Muller*, 100 N. J. Eq. 110, 135 A. 673 (1927); *Albert* v. *Ford Motor Co.*, 112 N. J. L. 597, 172 A. 379 (1934); *Lippincott* v. *Content*, 123 N. J. L. 277, 8 A. (2d) 362 (1939).

(c) The agency agreement was a form contract, prepared by defendant (Judge Collet's Finding No. 2, R. 28; R. 195-196, 240). Judge Collet found (Concl. II, R. 39) that if the agreement was ambiguous, it should be construed most favorably to plaintiff, since defendant prepared it. The majority opinion construed it most favorably to defendant, and in doing so decided the matter in conflict with the following New Jersey decisions: *Warsley* v. *Brtan*, 114 N. J. L. 36, 174 A. 743 (1934); *Serafino* v. *U. S. Fid. & Guar. Co.*, 122 N. J. L. 294, 4 A. (2d) 850 (1939); *Moran* v. *Fifteenth Ward Bldg. & Loan Ass'n*, 131 N. J. Eq. 361, 25 A. (2d) 426 (1942).

(d) The trial court found (Finding 19, R. 37) that after the purchaser had bought a large number of extinguishers, the defendant decided to "renegotiate" plaintiff's commissions (see also R. 172; 194). Judge Sanborn's opinion rules that defendant had the right, saying (R. 431):

> "Whether the reduction of commissions to agents was of benefit to the defendant or to the government, is not clear. The defendant was subject to the renegotiation of its war contracts and to wartime taxes upon its profits."

In holding in effect that defendant, a subcontractor under a war contract, being subject to renegotiation, had the right under the "Renegotiation Act" (Act of April

28, 1942, c. 247, Tit. IV, §403, 56 Stat. 245, U. S. C. A. Tit. 50, App. Sec. 1191), to renegotiate plaintiff's commissions under the agency agreement, the majority opinion decided an important question of federal law which has not been, but should be, settled by this Court; and has interpreted a federal statute in a way probably in conflict with applicable decisions of this Court.

Specification of Points Relied On.

The majority opinion erred:

(a) In ruling that plaintiff earned no commissions on the purchaser's optional orders under the annual purchase contract.

(b) In ruling that plaintiff earned no commissions on the purchaser's optional orders until the orders were received.

(c) In ruling that the agency agreement, applied to annual purchase contracts, was unambiguous.

(d) In ruling that defendant had the right to reduce plaintiff's commissions after the negotiation of the purchaser's annual purchase contract.

(e) In ruling that the defendant's reserved right to reduce commissions was absolute; or if conditional, that the requisite conditions arose.

(f) In ruling that defendant's actions in reducing commissions and appropriating the reductions to itself was good faith.

(g) In ruling that defendant had the right, under the Act of April 28, 1942 (Renegotiation Act), to renegotiate the agency agreement with plaintiff.

BRIEF IN SUPPORT OF PETITION FOR WRIT.

Statement of the Facts.[1]

For a number of years prior to May 18, 1941, plaintiff had sold defendant's products under annual agency appointments (Finding 2, R. 28, 158, 223-224). On this date plaintiff was again appointed defendant's exclusive distributor-agent to sell its products, including the extinguishers in question, in certain counties in Missouri and Kansas. The agency was for one year (Exhibit I, R. 86-87).

Paragraph 5(a) of the agreement provided:

> "The agent shall be allowed as compensation for performance of its obligations hereunder a commission of an amount in accordance with that set forth in the current commission schedule and current split commission policies furnished to agents by the manufacturer, copies of which have been delivered to and receipt of which is herewith acknowledged by the agent."

The current commission schedule referred to provided:

> "On portable and wheeled extinguishers, your [agent's] commission will be the difference between the sales price [to the customer] and the following schedule, all in accordance with the general policy on split commissions as outlined in the sales manual.

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(1) Judge Collet made his own fact findings. None were challenged by defendant or in Judge Sanborn's opinion. We therefore take our statement largely from those findings, assuming that they will be accepted here. *Boehmer* v. *Pennsylvania R. Co.*, 252 U. S. 496; *Charleston, S. C., Mining & Mfg. Co.* v. *United States*, 273 U. S. 220; *Texas & Pac. Ry. Co.* v. *Railroad Comm. of Louisiana*, 232 U. S. 338. In addition, most of the facts were stipulated (R. 128-143).

"HAND PORTABLES

* * * * * * *

"Model 15 ..... $34.30
"Model 20 ..... 41.65"

The last paragraph of the schedule provided:

> "The schedules are subject to change without advance notice and we reserve the right to act as final authority on questions of interpretation, or extension of them or to alter them if necessary to meet any unusual conditions not specifically covered." (Exhibit II, R. between pp. 86 and 87.)

In July, 1941, plaintiff procured for defendant (Finding 5, R. 31; Stip. Par. (4), R. 129; R. 405) from Standard Steel Works of North Kansas City, Missouri, a written "Annual Purchase Contract," signed by defendant and Standard, dated July 21, 1941, whereby Standard agreed to buy a minimum of 750 fire extinguishers between July 21, 1941, and July 21, 1942 (Exhibit III, R. between pp. 86 and 87). The contract contained these provisions:

> "That the Purchaser shall have the option of purchasing at any time within one (1) year from date hereof any increased number (over 750) of such Lux Fire Extinguishers, and
>
> "That the sales prices shall be as listed under the respective quantities corresponding to the total quantity shipped to the Purchaser under this contract, * * *."

The schedule of prices to Standard attached to the agreement was defendant's general price schedule to customers effective April 22, 1941, the same effective date of

the current commission schedules between plaintiff and defendant. However, the general price schedule on Model 15's was reduced by this written language:

> "* * * On a contract for 750 extinguishers the price of the Model 15 will be $43.75."

Between July 21, 1941, and April 28, 1942, Standard purchased 9,800 Model 20 extinguishers at the contract price of $54.74, and 1,000[2] Model 15's at the contract price of $43.75, the total purchase price being $577,925.00 (Stip., Pars. (6), (7), (9) and (10), R. 129-135; R. 123, 408; Stip., R. 136).

Under the current commission schedule plaintiff's commission, represented by one-half the difference between the prices to Standard and to plaintiff, was $6.54 on the Model 20's and $4.73 on the Model 15's (R. 68-69, 76; Exhibits II and III, R. between 86 and 87; R. 200, 241, 409, 410).

Effective August 1, 1941, by a new schedule (Exhibit IV, R. between 86 and 87), received by plaintiff on or before August 1, 1941, defendant, by increasing the prices to agents on the two models, reduced plaintiff's commissions on Model 20's from $6.54 per unit to $2.17 per unit, and on Model 15's from $4.73 per unit to $2.28 per unit (R. 201, Exhibit E, R. 205; Exhibit F, R. 211).

On March 12, 1942, effective March 16, 1942, defendant promulgated another written schedule of commissions (Exhibit V, R. between pp. 86 and 87) which reduced plaintiff's commissions from $6.54 per unit on the 20's to $0.52 per unit, and affected 8,140 Model 20's which were ordered in March and April, 1942 (Stip., Scheds.

(2) Three hundred of the 1,000 Model 15's were purchased for $36.16 sometime in 1942, the annual purchase contract providing that the purchaser should "derive all benefits from any decline in sales price on any unshipped portion of the contract."

"C" and "D," R. 139-144; R. 221, 242, 244, 257; Exhibit I, R. 225).

In late May or early June, 1942, after all 10,800 units had been ordered by Standard, defendant, having for almost a year computed and paid plaintiff's commissions under Exhibit II[3], recomputed them on all units previously shipped, by applying the schedule in effect when the orders were received, and on all subsequent shipments computed the commissions on the basis of the schedule in effect when the orders were received (Finding 14, R. 34; Finding 19, R. 37).

This recomputation and change in method decreased plaintiff's contractual commissions under Exhibit II $53,750.33 and *increased* defendant's net prices to itself and its profits in double this amount, $107,500.66 (R. 183, 244; Stip., Par. (13), R. 136).

None of the reductions in commissions were passed to Standard, the purchaser (Stip., Par. (12), R. 135-136).

Additional facts may be noted in the argument.

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(3) In addition, both before the execution of the agency agreement and the annual purchase contract and during the terms of these agreements, the defendant, on other annual purchase contracts, computed and paid the agents commissions in accordance with the schedule in effect on the date of each annual purchase contract (Findings 15 and 16, R. 35).

ARGUMENT.

I.

Questions (1), (2) and (3).

The agency agreement was at least ambiguous in its application to annual purchase contracts and the practical construction of the parties governed and settled its meaning.

Construing Exhibits I and II, applied to Exhibit III, Judge Collet ruled as matter of law that plaintiff's *right* to commissions on all 10,800 orders filled under the annual purchase contract was earned and became *fixed* when plaintiff procured the execution of that contract; and that the agency agreement was reasonably clear in its meaning that plaintiff's compensation on all orders was fixed by the contract and the schedule of commissions in effect when the annual purchase contract was negotiated (Concl. I and II, R. 38-39). He concluded also that if the agency agreement was ambiguous, it should be construed most strongly against defendant, who prepared it (Concl. II, R. 39), and he found as facts that continuously and without exception for almost a year following the negotiation of Exhibit III, both plaintiff and defendant interpreted the agreement as he did; and that defendant did not change its position until after Standard had ordered all 10,800 units (Findings 14, 15, 16, 17, 19, R. 34-37). He found also that defendant and other agents under other annual purchase contracts had interpreted the same agency agreement in the same way (Findings, *supra*). The record overwhelmingly supported these findings, and they were accepted in Judge Sanborn's opinion (R. 429).

This language of Judge Johnsen's dissent adds his view (R. 431):

> "Whether the right to change the amount of plaintiff's commissions was intended to be applicable to orders placed by a customer pursuant to an executed 'annual purchase contract,' where no reduction in price was made to the customer, or whether in such a situation a change in the commission schedule was intended to be applicable only to annual purchase contracts obtained after the change was put into effect, seems to me to be such an equivocal that any mutual interpretation of the agent's rights made by the parties themselves ought to be accepted as controlling."

Judge Sanborn held that while it is true that defendant had urged plaintiff to procure annual purchase contracts from customers, the written agency agreement obligated defendant to pay commissions upon consummated sales only; that there was nothing in the agency contract or commission schedule to indicate that commissions were to be paid by defendant to plaintiff for obtaining "options to purchase extinguishers"; that a broker employed to sell or procure a purchaser does not earn his commissions by procuring persons to sign an option to purchase and not binding them to purchase; and that plaintiff earned its commission with respect to each purchase order only when the order was placed with defendant (R. 428-429). He then ruled that the contract was not reasonably susceptible of any other interpretation (R. 429) and that the parties' misinterpretation could not be used to render the plain meaning of the contract doubtful (R. 429-430).

Laying aside all other reasons, it seems manifest that the application of the agency agreement to annual purchase contracts and optional orders under them is not clear from the fact alone that two learned federal judges, Judge Collet in the trial court and Judge Johnsen in the appellate court, have interpreted the provisions one way,

and two other learned judges, Judges Sanborn and Woodrough, have interpreted the same provisions in a diametrically opposite way. Add to this that plaintiff and defendant, and defendant and other agents, on 300 or more other annual purchase contracts, had for seven years been continuously interpreting these agreements as entitling agents to commissions fixed by the schedules in effect when these contracts were negotiated, and you crowd out of view the conclusion of the learned majority that the terms of this agreement are so clear as to leave no room for the claim that the practical construction of the parties themselves has settled its meaning.

And there are many weighty reasons which uphold Judge Collet's interpretation and Judge Johnsen's view.

Defendant, the author of the annual purchase contract, placed these agreements in the hands of plaintiff and other agents, and urged them to go out and secure as many as they could (Concl. III, R. 39; Plaintiff's Exhibit XVI, R. 127-128; R. 128).

Judge Sanborn's reasoning falters on an underlying fallacy. It overlooks the fact that in negotiating the Standard contract, with both firm and optional orders, plaintiff produced the very thing it was employed to get. The opinion is, of course, right when it holds that plaintiff earned its commissions with respect to each purchase order when the order was placed with the defendant, *if you apply that language to the ordinary order.* But it is not correct to say that plaintiff, engaged to procure optional orders from a purchaser, has earned nothing in the way of commissions for producing the very result it was employed to obtain.[4] The reason a broker employed

(4) Paragraph 5(a) (Sheet 3) of Exhibit I, the agency agreement (R. 86-87), provides in part:

"The agent shall be allowed as compensation *for performance of its obligations* hereunder a commission of an amount in accordance with that set forth in the current commission schedule * * *." (Italics ours.)

to procure a sale earns nothing when he brings back an option is that he has not performed his agreement. But plaintiff, engaged to secure option orders, brought back the very thing it was employed to procure, complied with its agreement and earned its commission. No one will deny that if plaintiff's agency had been cancelled the day after it secured the Standard contract that it would be entitled to commissions on all optional orders given by Standard during the ensuing year. Nor will it be contended that plaintiff would not be entitled to commissions on all such orders given by Standard, if they had been secured by the sole efforts of defendant itself. It must be accepted, then, that these commissions were *earned* when the Standard contract was negotiated. It is, of course, true that no commissions were due on any of the 10,800 orders, whether within or above the 750, until the orders were given. But the giving of the orders *accrued* commissions which had been *earned* when the Standard contract was negotiated. Judge Sanborn's opinion fails to take into account the controlling distinction between commissions earned and commissions accrued.

Ambiguity.

That the meaning of the agreement at least lies in doubt, calling for interpretation, is manifest. It is, of course, true as Judge Sanborn wrote, that there is nothing in the agency agreement or the commission schedule which obligates defendant to pay to plaintiff commissions for obtaining options to purchase extinguishers. For that very reason the commission formula of the agency agreement is ambiguous. The commission table dealt with and fitted ordinary purchases only. It did not attempt to fix the rights of the parties where the agent procured a customer's signature to defendant's annual purchase con-

tract. It therefore required construction and interpretation to apply this commission formula to annual purchase contracts. The agreement being ambiguous, the parties' own interpretation controlled and settled its meaning. *Van Dyke* v. *Anderson,* 83 N. J. Eq. 568, 91 A. 593 (1914); *Thomsen* v. *Riedel,* 114 N. J. L. 379, 176 A. 701 (1935); *J. I. Kislak, Inc.,* v. *Muller,* 100 N. J. Eq. 110, 135 A. 673 (1927); *Albert* v. *Ford Motor Co.,* 112 N. J. L. 597, 172 A. 379 (1934); *Lippincott* v. *Content,* 123 N. J. L. 277, 8 A. (2d) 362; *Haseltine* v. *Farmers Mut. Fire Ins. Co.,* 263 S. W. 810 (Mo. 1924).

II.

Questions (4), (5) and (6).

If defendant had the right to reduce plaintiff's commissions, that right was conditional only, and the specified conditions justifying reductions did not arise. If, as the majority opinion holds, the right to change existed and was absolute, it was exercised in bad faith.

The pertinent language in the last paragraph of Exhibit II is:

> "The schedules are subject to change without advance notice and we reserve the right * * * to alter them if necessary to meet any unusual conditions not specifically covered."(5)

By all canons of construction, the contractual price schedules to the agent on Exhibit II could not be in-

(5) The omitted language, giving it the right to act as final authority on the interpretation of the agreement, is not relied on by defendant. This provision is void. Williston on Contracts, Rev. Ed., Vol. 6, Sec. 1725; *Walsche* v. *Sherlock,* 110 N. J. Eq. 223, 159 A. 661 (1932); Corpus Juris Secundum, Vol. 17, Sec. 229, p. 603; *Ballinger Oil Mill, Inc.,* v. *Southern Cotton Oil Co.,* 37 F. (2d) 472 (C. C. A. 5, 1930); *Brucker* v. *Georgia Casualty Co.,* 326 Mo. 856, 32 S. W. (2d) 1088 (1930); *Wallace* v. *Brotherhood of Locomotive F. & E.,* 230 Iowa 1127, 300 N. W. 322 (1941); *Long* v. *Chronicle Pub. Co.,* 68 Cal. App. 171, 228 P. 873 (1924).

creased unless unusual conditions not then present and presumably not then known made such changes necessary. By law and by syntax the last clause of this paragraph qualified and limited the meaning of the first, if by the first the right to change was absolute. *Union Fur Shop, Inc.*, v. *Max Melzer, Inc.*, (N. J. Ct. of Errors, 1943) 29 A. (2d) 873, 875.

The majority opinion (R. 430-431) is not clear whether it rules defendant's right to reduce commissions as conditional or absolute. But in either event the result must be the same. If it was conditional, no new or unusual condition arose. If it was absolute, the manner in which it was exercised was bad faith and fraud as matter of law. In New Jersey, and everywhere, the relationship between principal and agent is one of mutual trust and confidence *Smyth Sales, Inc.*, v. *Petroleum Heat & Power Co.*, (3 Cir., interpreting N. J. law, 1942) 128 F. (2d) 697, 700-701. In transactions between persons occupying such relations, the burden of proof is upon the person who has acquired an advantage to show good faith. *Hall* v. *Otterson*, 52 N. J. Eq. 522, 528. In every contract there is an implied covenant that neither party will do anything, even in the exercise of a right, which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.[6] Judge Sanborn's opinion justifies the drastic commission reduction because (1) when the agency agreement was entered into the country was not yet at war; (2) defendant's product was needed for national defense; (3) the time was approaching when the

(6) *Manners* v. *Morosco*, 252 U. S. 317 (1920); *Kirke La Shelle Co.* v. *Paul Armstrong Co.*, 263 N. Y. 79, 188 N. E. 163 (1933); Williston, Contracts, Rev. Ed., Vol. 3, §670; *Uproar Co.* v. *Natl. Broadcasting Co.*, 81 F. (2d) 373 (1 Cir., 1936); *M. O'Neil Supply Co.* v. *Petroleum Heat & Power Co.*, 280 N. Y. 50, 19 N. E. (2d) 676, 678 (1939); *Schaefer* v. *Fulton Iron Works Co.*, 158 S. W. (2d) 452 (Mo. App., 1942); *McCombs* v. *Fid. & Casualty Co. of N. Y.*, 231 Mo. App. 1206, 89 S. W. (2d) 114 (1936).

services of salesmen were no longer needed; (4) defendant was subject to renegotiation and taxes upon its profits.

It is true all 10,800 units ordered by Standard were by Standard sold to the government (Stip., Par. (11), R. 135). But in May, 1941, defendant had been in war business for approximately two years (R. 195-196). It had been selling extinguishers for war purposes since 1939 (R. 177). When Exhibits IV and V were promulgated conditions were no more "unusual" than in May and July, 1941. It is true that defendant's business increased substantially after Pearl Harbor; but that was a mere extension in degree of the same conditions which had obtained since September, 1939.

Nowhere in any document of defendant's preparation was it stated or implied that defendant reserved the right to reduce commissions below the contract schedules and thereafter measure them by the effort involved. Neither principal nor agent in a contract may depart from his agreement or change the contract if the result obtained by the agent was brought about by less or greater effort than the parties anticipated.[7]

Renegotiation was a phantom excuse. Exhibit IV (R. 86-87), which cut plaintiff's commissions in half, was promulgated effective August 1, 1941. Exhibit V (R. between pp. 86 and 87), which reduced the commission on more than 8,000 Model 20's from $6.54 each to $0.52 each, was promulgated March 12, 1942. The original Renegotiation Act was passed April 28, 1942 (Act of April 28, 1942,

(7) Plaintiff earned its commission under the Standard contract, not alone by what it did in producing Exhibit III and securing these orders, but also as the result of hard and painstaking work and loyalty to defendant over many profitless years (R. 402, 403, 404, 405, 417-418). Moreover, if quantity orders were easier to get they were also more easily and more cheaply filled. Yet defendant, while it reduced the prices generally to customers on large quantity orders, still maintained its contract prices with Standard.

c. 247, Tit. IV, §403, 56 Stat. 245, U. S. C. A. Tit. 50, App. Sec. 1191). Moreover, during the entire period in question, 95 per cent of defendant's sales were directly to governments and only 5 per cent through agents to private persons (R. 177). Obviously, defendant's taxes would furnish no legal reason for impairing defendant's obligations under the contract. Nowhere in the Renegotiation Act of April 28, 1942, is the right given, or remotely implied, to a subcontractor, who is or may be renegotiated, to re-renegotiate his agents, through whom his products are sold. That right "is an attribute of sovereignty." Yet this is precisely what Judge Collet found the defendant undertook to do (Concl. 19, R. 37).

Bad Faith.

If plaintiff's commissions had become too high, defendant had an easy way and an absolute legal right, under Exhibits I, II and III, to reduce the commissions by reducing Standard's scheduled prices. And this could have been done without affecting defendant's net prices to itself. By this method the purchaser and the ultimate consumer would have benefited and defendant would have suffered not a dollar in loss to its own net prices or in its profits. Defendant did not do this. It did not pass on to the purchaser the drastic commission reductions promulgated by Exhibit IV, and particularly Exhibit V. It siphoned the difference into its own pocket. In the single instance of the Standard contract it swelled its own profits by at least $107,000. When it recomputed plaintiff, defendant made like "adjustments" in all other cases. Walton-Viking was "one of the smaller cases at issue" (R. 220). The record draws the curtain somewhat on how defendant fared as the result of recomputing and reducing distributors' commissions on 300 annual purchase contracts and

ballooning its own profits by the amount of the reductions.

Between 1939 and 1943 there were two stock splitups in defendant, one of five for one and one of two for one (R. 179). In 1943 each stockholder owned ten shares for one share held before December, 1939 (R. 180). After the ten for one splitup the dividends were $2 per share, equal to $20 per share on the capital stock of the company before December, 1939 (R. 187). The company paid $2 per share dividend in 1942, after it had given back to the government $6,600,000 on renegotiation (R. 187), and $2 per share in 1943, after it had set aside a reserve of $8,500,000 out of its profits against renegotiation on its 1943 business (R. 187). The inference is fair that defendant's net profits for 1942, after taxes, and before renegotiation, were about $7,660,000 (R. 187).

In other words, defendant utilized its right to reduce commissions, not for the benefit of the purchaser, the ultimate user, the taxpayer, the government, or its agents, but to swell its own profits in exact proportion to the amount of the reduced commissions. If defendant had exercised the right by reducing the contract prices to Standard, there would have been no "excessive" commissions, the purchaser would have benefited and the security of defendant's own net prices would not have been assailed or threatened.

Defendant was not interested in the taxpayer. It was not interested in its customers. It was not interested in its agents. Its real motives were plain. By forcing its customer to pay the full contract price without diminution defendant could maintain its gross sales at the highest possible figure. At the same time, by reducing commission rates, it could increase its net profits to the highest possible figure. Then, if renegotiated, either on the basis of sales or profits, or both, it would be in the best possible

position. Measured by any standard, defendant, in recasting "plaintiff's commission account to its own financial advantage" (Judge Johnsen, R. 432), cancelled its claims to good faith.

The effects of Exhibits IV and V disclose that defendant, having exhorted and encouraged plaintiff to solicit new annual purchase contracts and thereby make full use of "one of the finest sales tools offered you in recent years" (R. 128), penalized plaintiff for obtaining that contract. Three hundred Model 15's were ordered by Standard March 9, 1942. At that time a general price reduction had reduced Standard's contract price on 15's from $43.75 per extinguisher to $36.16. (The only reduction to Standard was on this 300.) Exhibit IV (in the 750 bracket where defendant placed plaintiff) had already increased the price to plaintiff to $39.20 (Stip., R. 131; Exhibit IV, R. beg. 86). Thus defendant, by March, 1942, had cut off all commissions on 15's by increasing the price to plaintiff more than $3 above the current price to customers. This was one of the "adjustments favorable to plaintiff" referred to in Judge Sanborn's opinion (R. 427).

Exhibit V was frankly aimed at agents who had produced annual purchase contracts. It changed the method of fixing commissions to a flat sum per extinguisher, the commission diminishing as the quantity increased (R. between pp. 86 and 87). Defendant, after all 10,800 extinguishers had been ordered by Standard, in recomputing plaintiff's commissions on 8,140 20's, treated each order as a part of the whole and fixed plaintiff's commissions at $0.52 per extinguisher by applying the 1,000 quantity bracket in Exhibit V. The inference is fair that it cost plaintiff substantially more than $0.52 per extinguisher to store them in its shop, deliver them as requested, expedite

shipments and generally to service the orders (R. 405, 406). Defendant justified its right to change commissions on optional orders upon the ground that each order was a separate transaction, an ordinary order. But for the purpose of reducing plaintiff's commissions to the minimum, $0.52 per unit, it treated all orders under the annual purchase contract as a part of one transaction. One example will suffice: On April 28, 1942 (Op. R. 427), Standard ordered 100 Model 20's. If that were treated as a separate order, plaintiff's commission under Exhibit V would have been more than $600 (Exhibit V, R. 86-87). But in defendant's recomputation, it treated this order as a part of the annual purchase contract, added it to the 8,040 previously purchased and credited plaintiff on that sale with the sum of $52 (Stip., Par. (10), R. 134).

Conclusion.

For all of the foregoing reasons, it is respectfully prayed that a writ of certiorari issue.

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INDEX.

PAGE

Table of Cases.

Statutes.

Texts.

In the Supreme Court of the United States

October Term, 1945.

WALTON-VIKING COMPANY, a Corporation, *Petitioner*,

vs.

WALTER KIDDE & COMPANY, INC., a Corporation, *Respondent*.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

No. 1253.

SUMMARY OF THE MATTER INVOLVED.

The United States Circuit Court of Appeals for the Eighth Circuit, in its opinion handed down March 11, 1946, concisely and clearly stated the issue in this case (153 F. [2d] 988, 989):

> "Under the plaintiff's interpretation of the agency contract, plaintiff was entitled to commissions based upon the commission schedule of the defendant which was in effect on July 21, 1941, the date when plaintiff procured for the defendant, from the Standard Steel

Works, a contract to purchase 750 extinguishers, with the option of purchasing more at the same prices during the ensuing year. Under the defendant's interpretation of the agency contract, the plaintiff's commissions were to be based upon the commission schedules which were in effect at the times the various orders were received by the defendant from the Steel Works."

Opinions in the Courts Below.

The opinion of the District Court of the United States for the Western District of Missouri, not officially reported, is found at pages 28 to 41, inclusive, of the Record.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is reported in full in 153 F. (2d) 988 (see also R. 423-433).

STATEMENT OF THE CASE.

The respondent (defendant) desires to direct this Court's attention to certain facts not contained in the statement of facts submitted by petitioner (plaintiff).

All of the orders for fire extinguishers received from Standard Steel Works and here in controversy were war orders (Stipulation of Evidence 11, R. 135). These war orders were obtained by the plaintiff in a volume "unheard of prior to the war" (R. 198, 218), and not only were they obtained without attendant increased sales effort and expense (R. 171, 413, 414), but, in at least one instance (the orders of March 23, 1942, for 8040 Model 20's), the order was obtained without any effort on the part of plaintiff (R. 218, 227, 228), while plaintiff's employee was at Standard Steel's plant "on other matters" (R. 407).

The current commission schedule dated February 17, 1941, effective April 22, 1941 (Exhibit II, R. 86-87), was the first commission schedule containing the language "the schedules are subject to change without advance notice • • •" (R. 195, 196). None of the prior commission schedules contain such language, nor did they contain any language of a similar nature and context (R. 195, 196).

Between November 10, 1941, and April 28, 1942, the defendant received orders from Standard Steel Works for 10,800 fire extinguishers and brackets, as follows (153 F. [2d] 988, 990; see also Stipulation of Evidence, R. 128-134):

"1941
Nov. 10, three orders aggregating....1660 Model 20's
1942
March 9, two orders aggregating....1000 Model 15's

March 23, eight orders aggregating..8040 Model 20's
April 28, one order for..... 100 Model 20's"

The statement of facts submitted by petitioner would lead this Court to believe that defendant computed commissions on all of these orders in accordance with the commission schedules contained in Exhibit II (see petitioner's brief, page 11). Such statement is clearly erroneous. The Stipulation of Evidence between plaintiff and defendant shows that errors were made by the defendant on 1,060 of the orders of November 10, 1941, for 1,660 Model 20's. Upon the balance of said orders of November 10, 1941, i. e., 600 Model 20's, the commissions were correctly computed by defendant in accordance with the commission schedule dated July 1, 1941 (Exhibit IV, R. 130, 137, 138). Errors were also made by defendant on 500 of the orders dated March 9, 1942, for 1,000 Model 15's, but again defendant correctly applied the commission schedule dated July 1, 1941, Exhibit IV, to the balance, i. e., 500 (R. 131, 138). The defendant applied the proper schedule (Exhibit V, dated March 12, 1942) to the orders for 8,040 Model 20's, dated March 23, 1942 (R. 133, 139-142), and to the order for 100 Model 20's dated April 28, 1942 (R. 134, 143). Thus, out of orders totaling 10,800 extinguishers, errors in computation of commission were made on only 1,560 extinguishers.

It should be further noted that, in accordance with the Agency Agreement (Exhibit I, R. 86-87), commissions on all orders were set up and paid to plaintiff as the extinguishers were shipped to Standard Steel Works (R. 137-143).

The statement of facts contained in the opinion of the Eighth Circuit Court of Appeals is very concise, and we refer this Court thereto, 153 F. (2d) 988, 989, 990, 991.

SUMMARY OF THE ARGUMENT.

I.

There are no "special and important reasons" for the granting of the writ of certiorari.

A. There is no question of general or national importance involved.

B. The opinion of the Circuit Court of Appeals is not in conflict with applicable local decisions.

C. The Circuit Court of Appeals did not decide any important question of Federal law which has not been, but should be, settled by this Court, nor did said Court of Appeals decide a Federal question in a way probably in conflict with the applicable decisions of this Court.

II.

Plaintiff earned its commissions only when it effected a sale.

III.

The contract between plaintiff and defendant was unambiguous and no construction thereof is permitted.

IV.

The contract between plaintiff and defendant gave defendant the right to change the commission schedules, and the change of said schedules by defendant was made in good faith.

ARGUMENT.

I.

There are no "special and important reasons" for the granting of the writ of certiorari.

A. There is no question of general or national importance involved.

The petitioner, under point (a) of its "Reasons for the Allowance of the Writ" (Petition and Brief, page 5), attempts to create the illusion that the issue involved in this cause is one of general or national importance. In support of its contention, plaintiff knowingly, or unwittingly, misstates certain facts and makes certain assumptions unsupported by any evidence. Plaintiff, referring to page 234 of the Record, correctly states that in July of 1941 defendant had in force approximately 300 to 350 annual purchase contracts, but the record does not contain any evidence to the effect that these other annual purchase contracts were procured by other agents while operating under the same type of agency contract and the same schedule of commissions as existed between plaintiff and defendant (R. 234). As has been pointed out under the statement of facts, the commission schedule effective April 22, 1941 (Exhibit II, R. 86-87), was the first commission schedule wherein defendant was given the right to change commission schedules without notice (R. 195, 196). The record is completely without evidence as to the date of the signing of other agency contracts, and they may have been entered into before, or after, the promulgation of the commission schedule (Exhibit II, effective April 22, 1941), whereby defendant reserved the right to change commission schedules. Of course, if these

other agency contracts were entered into prior to April 22, 1941, the effective date of Exhibit II (R. 86-87), the defendant had no right to change or alter its commission schedules, as to such other agents, and hence no conflict or controversy could arise between defendant and such agents. The trial court did find that "there were approximately 300 annual purchase contracts in effect between defendant and various purchasers which had been procured by agents of the defendant other than plaintiff, operating under the same type of agency contract and the same schedule of commissions as the plaintiff was operating under" (R. 35). But, as heretofore pointed out, such finding was without support in the evidence, and amounts to nothing more than an unsupported assumption. It should be noted, in this connection, that defendant duly excepted to this finding of the trial court (R. 50).

The sales secured by plaintiff were smaller than the sales secured by other agents (R. 220), but it is not true, as inferred by plaintiff, that plaintiff's claim is one of the smaller claims made by agents against defendant. The record contains no evidence to support such statement or inference, nor does the record show that "the review herein sought will affect the rights of hundreds of other agents, involving, it may be fairly assumed, commissions amounting to many millions of dollars." (Petition and Brief, page 5.) The record not only fails to disclose other pending suits, but it does not disclose any pending claims against defendant. In the absence of any evidence pro or con, neither the plaintiff nor this Court can assume that such claims or suits are pending. As a matter of fact, if the parties are to be permitted to go beyond the record, it is now stated that plaintiff's claim *is the only claim* that has been made by any agent against the defendant.

This Court has many times stated that the granting of a writ of certiorari "is a jurisdiction to be exercised sparingly."[1] It is, to say the least, strange to find a petitioner asking this Court to use this jurisdiction, ordinarily sparingly exercised, to investigate an assumption sustained by not one shred of evidence.

B. The opinion of the Circuit Court of Appeals is not in conflict with applicable local decisions.

Before discussing the alleged conflict between the ruling of the Circuit Court of Appeals and the New Jersey decisions cited on page 6 of the Petition for Writ of Certiorari and Supporting Brief, it should be noted that the trial judge did not find the contract between plaintiff and defendant to be ambiguous. In his conclusions of law the trial judge stated (R. 39):

> "The written instruments construing the contract between plaintiff and defendant appear to be reasonably clear in their meaning and intent, and state with reasonable definiteness and clarity the intention of the parties as stated in the preceding paragraph. But if there be ambiguity therein, those instruments should be construed more favorably to the plaintiff than to the defendant, since the defendant prepared them in every instance, and in most instances they were forms reflecting very careful consideration and preparation by the defendant."

In the next sentence, Judge Collet merely drew an erroneous legal conclusion by holding (R. 39):

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[1] *Hamilton Brown Shoe Co.* v. *Wolf*, (Mo. 1916) 240 U. S. 251, 36 S. Ct. 269, 60 L. Ed. 629; *Fields* v. *U. S.*, (Dist. Col. 1907) 205 U. S. 292, 296, 27 S. Ct. 543, 51 L. Ed. 807, 810; *Forsyth* v. *Hammond*, (Ind. 1897) 166 U. S. 506, 514, 17 S. Ct. 665, 41 L. Ed. 1095, 1098; *American Constr. Co.* v. *Jacksonville, etc., R. Co.*, (Fla. 1893) 148 U. S. 372, 383, 13 S. Ct. 758, 37 L. Ed. 486, 491.

"Under the contract between plaintiff and defendant, plaintiff's rights to commission on all orders received and filled under the annual purchase contract with the Standard Steel Company were earned and became fixed when it, the plaintiff, procured the execution of that contract on July 21, 1941."

Even a casual reading of the decisions cited by plaintiff under points (b) and (c) of Reasons for the Allowance of the Writ (Petition and Brief, page 6) discloses that those decisions are not in conflict with the decision of the Circuit Court of Appeals in this cause. The decisions under point (b) state the generally recognized principle of law, that if a contract be determined ambiguous and thus construction of the contract becomes necessary, the court will adopt that construction which the parties themselves place upon the contract. The decisions cited by plaintiff under point (c) again announce a general rule of law, i. e., that an ambiguous contract is to be construed most strongly against the party who prepared it. It will be noted that both of the above stated rules are applicable if, and only if, the contract be determined ambiguous.

The question presented here is the alleged conflict of the opinion of the Court of Appeals with the rules of law above announced by the New Jersey courts. The Circuit Court of Appeals in discussing the contract between plaintiff and defendant, said contract consisting solely of the agency contract and the current commission schedule, stated (153 F. [2d] 988, 991):

"In this case the actual sales under the option were not made until the purchase orders were received by the defendant. The defendant was not indebted to the plaintiff for commissions until the orders were received. The plaintiff earned its commission with respect to each purchase order when the order was placed with the defendant. Compare

Ohio Marble Co. v. *Byrd,* 6 Cir., 65 F. (2d) 98, 101. Then, and then only, did the plaintiff procure a sale to the Standard Steel Works. This, it seems to us, is the rational construction of the agency contract as applied to purchases under the option held by the Steel Works.

"The plaintiff argues that this interpretation is inconsistent with the construction placed upon the agency contract by the parties themselves.

"There was evidence tending to show that up to about May 27, 1942, the defendant's policy had been to treat orders received under an 'annual purchase contract' as though the orders had been received upon the date the contract was entered into, and to pay or to credit commissions accordingly. The defendant denied the existence of such a policy, and attributed the allowance, and the setting up on its books, of commissions upon that basis to errors made by inexperienced personnel under pressure of a vast expansion due to war. The District Court was not compelled to accept the explanation of the defendant, and might, we think, infer, as it did, that the computation or recomputation by the defendant of plaintiff's commissions after all orders had been received from the Standard Steel Works was due to something more than mere clerical errors.

"It is our understanding, however, that an unambiguous contract is not rendered ambiguous by the practical construction which is placed upon it by the parties. The rule of practical construction is an aid to the interpretation of a contract which is reasonably susceptible of different interpretations, and may not be used to render the plain meaning of a contract doubtful. (Citing cases.) The rights of the parties here were fixed by their written agency agreement at the time it was entered into. The subsequent misconstruction or misapplication of the contract by one or both would not alter their contract rights, nor would a miscomputation of commissions preclude the making of a correct recomputation."

In its holding as quoted above, the Circuit Court of Appeals did not construe the contract "most favorably to defendant," nor did it disregard the rule that in the event of ambiguity, the construction placed upon the contract by the parties is controlling. On the contrary, the court recognized these rules, but held the contract to be *unambiguous* and hence there was no occasion for the application of these canons of construction.

The language contained in *Serafino* v. *U. S. Fidelity and Guaranty Company*, 122 N. J. L. 294, 4 Atl. (2d) 850, one of the cases cited by petitioner as being in conflict, contains the following language:

> "It is pertinent to observe here that the parties to such a contract are free to enter into such engagements as they choose, if not in contravention of statutory inhibitions or public policy. When the language employed to express the common intention is clear and unambiguous, giving to the words their ordinary significance and taking into consideration the general design and purpose, there is no occasion for the application of the canons of construction. As in the case of other contracts, the judicial function is limited to the effectuation of the plainly expressed intention of the parties to the contract. * * * Where, as here, the words used to express the common purpose are plain and unequivocal, and delimit with understandable certainty the liability imposed upon the insurer, there is not room for the application of the rules of construction designed to resolve doubts and ambiguities arising from the language employed to express the agreement. (Citing cases.)"

It is exceedingly difficult to determine wherein the plaintiff finds the alleged conflict. The Court of Appeals in its decision and the New Jersey courts in their decisions all recognize the standard canons of construction, and they

further recognize that it is only in the case of an ambiguous contract that these canons of construction are applicable. Both the trial judge and the Circuit Court of Appeals found the contract to be unambiguous, thus rendering inapplicable any decisions relating to the application of the canons of construction.

C. The Circuit Court of Appeals did not decide any important question of Federal law which has not been, but should be, settled by this Court, nor did said Court of Appeals decide a Federal question in a way probably in conflict with the applicable decisions of this Court.

Plaintiff states (Petition and Brief, pages 6 and 7) that the Court of Appeals held that the defendant had the right under the "Renegotion Act" (Act of April 28, 1942, c. 247, Tit. IV, Sec. 403, 56 Stat. 245, U. S. C. A. Tit. 50, App. Sec. 1191) to renegotiate plaintiff's commissions and thus has decided an important question of Federal law which has not been settled by this Court, and has further interpreted the Federal statute in any way probably in conflict with applicable decisions of this Court. This is without foundation.

The plaintiff by extracting certain language from the opinion of the Court of Appeals (Petition and Brief, p. 6) has attempted to build from whole cloth some basis for its contention, but even the language extracted by plaintiff does not in any way support its contention. This is doubly true when the language quoted by plaintiff is read in connection with the other language contained in the same paragraph. Said paragraph is as follows (153 F. [2d] 988, 992):

> "The argument that the reduction of the plaintiff's commissions without reducing the price of the extinguishers to the purchaser was unconscionable and resulted in the unjust enrichment of defendant, is, we

think, unsound. The defendant was, by the terms of the agency contract, entitled to decide what commissions it was justified in paying sales agents for their services in view of the abnormal conditions which existed. Whether the reduction of commissions to agents was of benefit to the defendant or to the government is not clear. The defendant was subject to the renegotiation of its war contracts and to wartime taxes upon its profits. The fire extinguishers were, after all, made and owned by the defendant and it was under no legal compulsion to share profits with the plaintiff or other sales agents. The problem here is to determine what commissions, under the agency contract, the plaintiff was entitled to receive and the defendant was required to pay. The parties are bound by their contract, and considerations of profit or loss cannot be invoked to change it. Compare, *E. I. DuPont de Nemours & Co.* v. *Clairborne-Reno Co.*, 8 Cir., 64 F. ,(2d) 224, 233, 89 A. L. R. 238, and *Block* v. *Walker*, 6 Cir., 72 F. 650, 655."

From the above quotation, it is obvious that the Court of Appeals held only that defendant had the absolute right to change its commission schedules, and that whether defendant or the government (by virtue of renegotiation) gained by a reduction in commissions paid was not an issue before that court. The court did not say, and did not attempt to say, that defendant had the right to renegotiate plaintiff, and such issue has not heretofore been raised, and defendant has not heretofore made any such contention. The defendant did introduce certain exhibits (Exhibits A, R. 173, 174; Exhibit B, R. 175, 176, 177) and testimony (R. 171-176) that excessive commissions would not be allowed as a deduction from the income tax or as a cost in war contracts, and that defendant was on guard against such excessive commissions for that reason and for that reason only. The defendant did establish that

it was renegotiated (R. 172, 190) to refute the charge of plaintiff that defendant unjustly enriched itself by reducing commissions and in not passing such reductions on to the customer, but there was no contention and no evidence that defendant attempted to renegotiate plaintiff, pursuant to the terms of the so-called "Renegotiation Act." That the trial judge clearly understood the position of defendant is evidenced by the fact that the word "renegotiating" as used in his finding of fact No. 19 (R. 37) was placed in quotes.

We wish to repeat that the Court of Appeals did not hold, and obviously did not intend to infer, that defendant had the right to renegotiate plaintiff pursuant to the "Renegotiation Act," and did not decide any question in connection with such Act. This contention of plaintiff is completely without merit and has no foundation in law or fact.

II.

Plaintiff earned its commissions only when it effected a sale.

Plaintiff has taken the position that the commissions on all sales to Standard Steel Works were fixed and determined as of the date of the signing of the annual purchase contract, whereby Standard Steel agreed to purchase 750 extinguishers and defendant granted to Standard Steel the option to purchase extinguishers in excess of 750. The fallacy of this position is best answered by the opinion of the Circuit Court of Appeals (153 F. [2d] 988, 991):

> "The weakness of the plaintiff's position is that the 'annual purchase contract' obligated the Standard Steel Works to purchase only 750 extinguishers. It could, under its option, purchase more of defendant's extinguishers at the same price if it saw fit to do so,

or it could supply its needs from other sources. It was as free to purchase its requirements (in excess of 750 extinguishers) from others as it would have been if the option did not exist. The procuring of the 'annual purchase contract' by the plaintiff did nothing more than increase the probability that the Standard Steel Works would purchase from the defendant more than 750 extinguishers during the year the contract was in force. There is nothing in the agency contract or the commission schedule, which was a part of it, to indicate that commissions were to be paid by the defendant to the plaintiff for obtaining options to purchase extinguishers. It is true that the defendant had urged the plaintiff to procure 'annual purchase contracts' from customers, but the written agency agreement obligates the defendant to pay commissions upon consummated sales only. 'A broker employed to sell or procure a purchaser does not earn his commissions by procuring persons to sign an option to purchase, and not binding them to purchase. *Runyon* v. *Wilkinson,* (Gaddis & Co.) 57 N. J. L. 420, 424, 31 A. 390.' *Stengel* v. *Sergeant,* 74 N. J. Eq. 20, 68 A. 1106, 1111.

"In this case the actual sales under the options were not made until the purchase orders were received by the defendant. The defendant was not indebted to the plaintiff for commissions until the orders were received. The plaintiff earned its commission with respect to each purchase order when the order was placed with the defendant. Compare *Ohio Marble Co.* v. *Byrd,* 6 Cir., 65 F. (2d) 98, 101. Then, and then only, did the plaintiff procure a sale to the Standard Steel Works. This, it seems to us, is the rational construction of the agency contract as applied to purchases under the option held by the Steel Works."

The holding of the Circuit Court of Appeals finds its factual basis in the language of the agency contract exist-

ing between plaintiff and defendant. The provisions of the agency contract (Exhibit I, R. 86-87; also set forth in the decision of the trial court, R. 28, 29), clearly shows that the agent was appointed to *sell* defendant's products, and upon the sale of said products was entitled to a commission. This is pointed out in the preamble to the agency contract in the following words:

> "Whereas the party hereinafter designated as agent, desires to secure an agency appointment *for the sale of* Kidde products * * *." (Emphasis supplied.)

The appointive section of the agency contract provides:

> "Now, therefore, Walter Kidde & Company * * * hereby appoints Walton-Viking Company, Inc., * * * exclusive distributor-agent to *sell* for it Kidde products * * *." (Emphasis supplied.)

Paragraph 3(a) of said agreement provides that:

> "The agent is hereby authorized to solicit, as agent, *sales* of Kidde products * * *." (Emphasis supplied.)

It is agreed that the commission schedule attached to the agency contract is part of such contract, and said schedule (Exhibit II, R. 86-87) provides as follows:

> "All commissions earned by you (plaintiff) *on the sale* of Lux equipment * * *." (Emphasis supplied.)

From the above quoted language, it is clear that the agency contract contemplated, and the parties intended, that commissions were to be earned only when plaintiff effected a *sale* and not when defendant granted to a pros-

pective purchaser an option to purchase. Throughout the contract, the word consistently used by the parties was the word "sale," and at no place in said agency contract is there any reference to "option." In this connection, it should be borne in mind that the annual purchase contract between defendant and Standard Steel was not a part of the agency agreement existing between plaintiff and defendant. Said agency agreement consisted solely of the "agency contract" (Exhibit I, R. 86-87) and the "commission schedule" (Exhibit II, R. 86-87).

The annual purchase contract between defendant and Standard Steel was merely an agreement that Standard Steel would, within a year's period, buy 750 extinguishers at a fixed price. It did not require Standard Steel to order more than 750, and the very granting of an option contemplated that no sale beyond the minimum quantity (750) would be made unless and until Standard Steel exercised the option by the issuance of purchase orders. Thus clearly, the actual sales over and above 750 were the orders sent in from time to time by Standard Steel to the defendant. The commission schedules speak of *sales* upon which commissions are due and payable and not upon an optional agreement to purchase under which no sales or many sales might be made.

Clearly and unambiguously, the commission schedule in effect at the time the actual *sale* was made fixes the commission to the agent, and to hold otherwise would be to rewrite the agency contract and insert a provision that the commissions were earned and payable at the time an option contract was obtained by the plaintiff.

The authorities are unanimous upon the proposition that a broker earns no commission for the mere procure-

ment of an option where his contract of employment provides for the payment of commissions on *sales*.[2]

III.

The contract between plaintiff and defendant was unambiguous and no construction thereof is permitted.

The agency contract between plaintiff and defendant (Exhibit I, R. 86-87) clearly provided, as heretofore pointed out under Point II hereof, that plaintiff earned its commission only when it effected a sale, and we have heretofore pointed out under Point II hereof that the "annual purchase contract" signed by Standard Steel was not a sale beyond the minimum quantity of 750 extinguishers, but that it was merely an option to buy any increased number of extinguishers. Plaintiff, however, insists that there is a distinction between "ordinary sales" and sales made pursuant to the exercise of an option contained in an annual purchase contract. This is an attempted distinction without difference. It will be noted that the annual purchase contract (Exhibit III, R. 86-87) does not affect, nor was it intended to affect, the commission to agents. It does not waive the requirements of the Agency Agreement that a *sale* be made before the agent's commissions are earned or accrued. As has been heretofore demonstrated at the time of the execution of the annual purchase contract, there was a *sale* only to the extent of 750 extinguishers. As to those 750 extinguishers,

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[2]*Stengel* v. *Sergeant*, (1908) 74 N. J. Eq. 20, 68 A. 1106, 1111; *E. I. DuPont de Nemours Powder Company* v. *United Zinc & Chemical Co.*, (1914) 85 N. J. L. 416, 89 A. 992; *Runyon* v. *Wilkinson Gaddis & Co.*, (1895) 57 N. J. L. 420, 31 A. 390; *Frizzell* v. *Stewart Lumber Co.*, (Mo. Sup. 1931) 44 S. W. (2d) 615; *Gibson* v. *Pleasant Valley Development Co.*, 320 Mo. 828, 8 S. W. (2d) 828; *Keystone Steel & Wire Co.* v. *Kokomo Steel & Wire Co.*, (CCA 7) 1 F. (2d) 790; *Warnekros* v. *Bowman*, (Ariz. 1912) 128 Pac. 49, 43 L. R. A. New Series 91; *Milstein* v. *Doring*, (1905) 95 N. Y. S. 417.

plaintiff had met the requirement of a *sale* and had earned its commissions thereon. As to the other orders from Standard Steel which were subsequently made by virtue of the option in the annual purchase contract, the requirement of a *sale* still existed, and the amount of the commission to plaintiff on such sales was fixed by either Exhibit II, Exhibit IV or Exhibit V (R. 86-87), depending upon the schedule in effect at the time the *actual sale was made.*

The agency agreement between plaintiff and defendant contains no language indicating a difference in the manner of determining commissions on sales made pursuant to annual purchase contracts, and sales of any other nature. The sole requirement is that a sale be made, and until such sale, no commissions were earned or accrued by plaintiff.

The fallacy of the distinction which plaintiff attempts to draw between sales made pursuant to annual purchase contracts and what it terms "ordinary purchases" is made clear when one considers the purpose of an annual purchase contract. It was promulgated by the defendant so that a customer would be bound to take a minimum number of extinguishers during the year, and the option part was designed to keep the customer in the habit, as it were, of purchasing all of its requirements from defendant. The purchaser was not bound to purchase more than 750 extinguishers, but by purchasing the 750 it received the benefit of a reduced price, both as to the 750 and any it might purchase under the option. The defendant benefited because it not only obtained an order, but it established a new customer. The plaintiff benefited because it had obtained an order for a minimum number of extinguishers, and also because sales resistance was materially reduced in connection with any purchases the customer might make

under its option. Thus, the execution of the annual purchase contract was a *preliminary step* in connection with an ultimate sale to the consumer, designed to reduce sales resistance and establish a customer. It was never contemplated that the execution of an annual purchase contract waived the requirement of the agency agreement that an actual sale must be made before the agent earned his commission.

The agency agreement not only requires that *sales* be made before a commission be earned, but also states in the following language that defendant has reserved the right to change commission schedules without notice:

> "The schedules are subject to change without advance notice * * *."

How could the language have been made more clear? Should defendant have anticipated that some court might some day add to the agreement of the parties a parenthetical restriction upon the application of this reservation to sales other than those effected through the medium of the exercise of an option under an annual purchase contract? The Court of Appeals thought not, and in the following language held that it was a binding and unambiguous contract between the parties which the court had no power to rewrite (153 F. [2d] 988, 991):

> "It is our understanding, however, that an unambiguous contract is not rendered ambiguous by the practical construction which is placed upon it by the parties. The rule of practical construction is an aid to the interpretation of a contract which is reasonably susceptible of different interpretations, and may not be used to render the plain meaning of a contract doubtful. (Citing cases.) The rights of the parties here were fixed by their written agency agreement at the time it was entered into. The subsequent miscon-

> struction or misapplication of the contract by one or both would not alter their contract rights, nor would a miscomputation of commissions preclude the making of a correct recomputation."

As has been heretofore pointed out under Point I B hereof, where the contract be determined unambiguous, as here, the rights of the parties are fixed by their language, and there is no room for the application of the canons of construction. In addition to the cases supporting this rule cited by the Circuit Court of Appeals (153 F. [2d] 988, 992, Footnote 1) see also *In re Chicago & E. L. Ry. Co.*, (C. C. A. 7) 94 F. (2d) 296; *Illinois Fuel Co.* v. *Mobile & Ohio R. Co.*, 319 Mo. 899, 8 S. W. (2d) 834 (Cert. Den. 278 U. S. 640); *Burnham* v. *Borden Company*, 121 N. J. L. 435, 3 A. (2d) 151.

IV.

The contract between plaintiff and defendant gave defendant the right to change the commission schedules, and the change of said schedules by defendant was made in good faith.

The contract between plaintiff and defendant provided (Exhibit II, R. 86-87):

> "The schedules are subject to change without advance notice, and we reserve the right to act as final authority on questions of interpretation, or extension of them, or to alter them if necessary to meet any unusual conditions not specifically covered."

It will be noted that the agent was notified by the above language that "the schedules are subject to change," and further, that defendant had reserved the right "to alter them if necessary to meet any unusual conditions not specifically covered." The notice of the right to change

and the reservation of the right to alter are separate and distinct. When the above quoted sentence is broken down, it is plain that four rights are reserved in defendant:

(1) To *change* the schedules without advance notice.
(2) To act as final authority on questions of interpretation of the schedules.
(3) To act as final authority on questions of extension of the schedules.
(4) To *alter* the schedules to meet any unusual conditions not specifically covered.

Each of these clauses must stand alone. Clause number (1) is followed by the conjunction "and" and needs no interpretation. It is perfectly plain that none of the clauses which follow clause (1) modify or diminish the effect of this absolute right to change the schedules without advance notice.

A careful study of the above quoted sentence reveals that clause number (4) does not modify or diminish the all-inclusiveness of clause number (1). While "change" and "alter" are usually considered synonymous, there is a substantial difference. Webster's International Dictionary explains this difference as follows:

> "*Change* is generic and the stronger term. It may express a loss of identity or the substitution of one thing in place of another; *alter* commonly expresses a partial change, or a change in form or details without destroying identity."

This explanation of the difference between the two words makes it crystal clear that defendant had the unrestricted right to change the schedules, i. e., to substitute a new schedule for the old, and that it also had the right, even after a new schedule had been issued to alter it (i. e., to partially change it) if necessary, to meet unusual conditions.

It is the contention of plaintiff that defendant did not have the right under existing conditions to change the commission schedules, and if such right existed, it was exercised in bad faith. This contention is clearly and concisely stated and answered by the Court of Appeals in the following language (153 F. [2d] 988, 992):

> "(6) The plaintiff argues that the defendant did not effectively exercise its right to change commissions. The answer is that the defendant changed the applicable commission schedules, as it had a right to do under the agency contract. The contention that the defendant was shown to have exercised this right in bad faith is, we think, untenable. At the time the agency contract was entered into this country was not yet at war, although war orders in large volume were being placed. The defendant's products were needed for national defense. The time was rapidly approaching when the products would sell themselves and when the services of salesmen to secure orders were no longer required and no longer valuable. To hold that the defendant could not, in good faith, under the circumstances, change the compensation payable to agents for selling its products would be unrealistic.
>
> "(7) The argument that the reduction of the plaintiff's commissions without reducing the price of the extinguishers to the purchaser was unconscionable and resulted in the unjust enrichment of defendant is, we think, unsound. The defendant was, by the terms of the agency contract, entitled to decide what commissions it was justified in paying sales agents for their services in view of the abnormal conditions which existed. Whether the reduction of commissions to agents was of benefit to the defendant or to the government is not clear. The defendant was subject to the renegotiation of its war contracts and to wartime taxes upon its profits. The fire extinguishers were, after all, made and owned by the defendant, and it was under no legal compulsion to share profits

with the plaintiff or other sales agents. The problem here is to determine what commissions, under the agency contract, the plaintiff was entitled to receive and the defendant was required to pay. The parties are bound by their contract, and considerations of profit or loss cannot be invoked to change it. Compare *E. I. DuPont de Nemours & Co.* v. *Claiborne-Reno Co.*, 8 Cir., 64 F. (2d) 224, 233, 89 A. L. R. 238, and *Block* v. *Walker*, 6 Cir., 72 F. 650, 655."

It is our thought that these contentions of plaintiff are fully and ably answered by the above quotation, but for this Court's convenience we call attention to the pages of the record supporting the findings of the court as stated above. The clause in question was for the first time inserted in the commission schedule dated February 17, 1941, effective April 22, 1941 (Exhibit II, R. 86-87), because defendant was receiving increased war business as a result of the European conflict, and it rightly anticipated that the volume would later reach enormous proportions (R. 195, 196).

The first change or alteration in the commission schedule by the defendant was effective August 1, 1941 (Exhibit IV, R. 87). At that time, the volume of orders had increased to a considerable extent as a result of the European war (R. 168, 169, 195, 196, 198, 218). The schedule change did not reduce commissions on any quantity of sales up to 99 extinguishers (R. 198, 199), a number within which any normal peacetime sale would fall (R. 169, 198, 224). It did reduce commissions on sales of 100 extinguishers or over. It will be seen that the purpose of such change was not to affect the commissions of agents doing a normal peacetime business, but only to affect those agents in favored territories where war contracts were pouring in as government procurement increased (R. 198, 199, 241). Such contracts were obtained by the

agent without a proportionate increase in cost or effort on the part of the agent. In the present case, there was evidence that the order for 8,040 Model 20 extinguishers was sent by the customer to the plaintiff over the telephone (R. 227, 228). Plaintiff's own testimony was to the effect that it learned about this order while in Standard Steel's plant "on other matters" (R. 407).

The second change in the schedule of commissions was effected in March of 1942 (Exhibit V, R. 87), following by a few months the entry of the United States into the war. Such entry resulted in the further vast expansion of war orders and a corresponding increase in agents' commissions without a proportionate increase in cost or effort on the part of the agent (R. 171, 172, 218, 219). This schedule actually resulted in increasing the amount of commissions paid to agents in the lower quantity sales (R. 217, Exhibit H, R. 220), but reduced commissions in the higher quantity sales. The higher quantity sales existed only because of the war. No such quantities of extinguishers had ever been sold by the plaintiff or any other agent in peacetime (R. 169, 198, 224). Thus the defendant sought by this schedule to assist an agent who did not receive war contracts by increasing the amount of commissions on lower quantity sales. Such assistance was considered necessary because normal commercial contracts were more difficult to fill in wartimes due to government priorities and material controls. While the rate of commission was reduced on the larger quantity sales, the agent by no means suffered financially as a result of such reduction. The following table shows the amount of commissions received by plaintiff during the peacetime years of 1936 to 1939, inclusive, and the amount of commissions received by plaintiff during the war years of 1940 to 1943, inclusive (R. 226):

Base Period		War Period	
1936	$1,429.44	1940	$ 5,500.26
1937	1,605.68	1941	17,130.97
1938	841.95	1942	20,917.68
1939	2,392.85	1943	13,999.41

It is respectfully submitted that the foregoing changes in the commission schedules were made in good faith and for most laudable purposes, namely, to prevent inflationary commissions, to hold the same within reasonable limits commensurate with the cost and effort expended by the agent, to protect the defendant against the disallowance of excessive commissions by government contracting agencies, and to protect the plaintiff as well as the defendant against any scandal pertaining to excessive commissions under war contracts (R. 172, 182, 194, 228).

In order for the plaintiff to defeat the defendant's right to change the commission schedules under the Agency Agreement, it is necessary for the plaintiff to show that such changes were made fraudulently and in bad faith.[3] There is no evidence whatsoever to support such a charge.

It is difficult to imagine how defendant could have more clearly notified plaintiff that the commission schedules were subject to change. The language used is precisely that, i. e., "The commission schedules are subject to change," and for plaintiff to argue that wartime conditions, with which we are all familiar, were not unusual conditions is, to say the least, unrealistic.

Plaintiff argues that defendant should have reduced commissions by reducing the price at which extinguishers were sold to consumers. It suggests that bad faith should

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[3] *Lippincott* v. *Content*, 123 N. J. L. 277, 8 A. (2d) 362, 363 (cited by plaintiff); *Serafino* v. *U. S. F. & G. Co.*, 122 N. J. L. 294, 4 A. (2d) 850 (cited by plaintiff); 17 C. J. S., page 820; 2 Am. Jur., page 244.

be inferred from the fact that defendant failed to use this method of reducing plaintiff's commissions. The argument is simply this: If defendant had reduced plaintiff's commissions by reducing the price to Standard Steel, there would be no argument. Defendant's reserved right would then have been exercised in good faith, but since it reduced plaintiff's commissions in a different manner, i. e., by changing commission schedules, as provided in the contract, it displayed bad faith. It is respectfully submitted that if the pursuit of a circuitous route to effectuate a reduction in plaintiff's commissions would have changed the "good faith" status of the transaction, good faith would have become a matter of grammar rather than of substance. There is no basis in law or in fact for inferring bad faith from the naked fact that plaintiff pursued the precise course stipulated in the contract. Defendant had the right under its contract with plaintiff to adopt the means suggested by plaintiff or to adopt the means it actually used. It was under no requirement to select one means or the other. Plaintiff entered into its contract with defendant aware of the language contained in the contract, and as stated in the opinion of the Court of Appeals (153 F. [2d] 988, 992):

> "The parties are bound by their contract and considerations of profit or loss cannot be invoked to change it. (Citing cases.)"

One of the cases cited by plaintiff, *Lippincott* v. *Content*, *supra*, contains the following statement:

> "Persons, however, are free to insert their own limitations in the contracts they make, subject only to legality of the purpose and the consideration of public policy."

The evidence contained in the record amply supports the findings of the Court of Appeals that defendant not only had the right to change commission schedules, but that it properly exercised such right in view of unusual and changing conditions.

Plaintiff asserts that defendant put the reduction in commissions into its own pocket for its own benefit, and thereby is guilty of bad faith in changing the commission schedules. This is a bald statement and is not justified by the record. The record discloses (1) that the defendant was renegotiated and that any excessive profits were thereby eliminated by government action (R. 172, 190); (2) that excessive commissions to brokers on war contracts were not only against public policy, but were, in fact, disallowed as an item of cost by government contracting agencies, and that this defendant, as a government contractor, was obliged to avoid the payment of excessive commissions to its agent (R. 171-176); (3) as a specific reduction, the price to Standard on Model 15's was reduced on existing contracts from $43.75 to $36.16. On October 5, 1942, there was a general price reduction on all of defendant's products (R. 212). The record discloses that there was no reduction on Model 20's, because that item had been discontinued in an effort to standardize products according to military needs, and the production of Model 20's was continued only as to Standard because defendant was under contract to supply the same (R. 212).

The foregoing facts infer good faith in the defendant, rather than bad faith, as contended by the plaintiff.

Conclusion.

Respondent respectfully submits:

(1) That there are no "special and important reasons" for the granting of the writ of certiorari;

(2) That the findings of fact and conclusions of law made by the Court of Appeals are amply supported by the record and by the applicable law.

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